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Via email attachment only

TO: Janet M. Sheppard, Esq., Northampton City Solicitor

RE: Legal issues involved in two resolutions before the Northampton City Council
concerning public input on proposed landfill expansion

Dear Janet:

You have requested my opinion about legal issues involved in two resolutions before the Northampton City Council. The initial resolution, by Councilors LaBarge & Bardsley, is attached as Appendix No. 1. The proposed amendment by Councilors Reckman and Carney is attached as Appendix No. 2.

I believe the legal issues involved are fully addressed by Sections 1, 3 & 6 of my March 6, 2008 memorandum to you. Section 1 explained that the "City Council acts in a 'quasi-judicial' rather than a legislative capacity when considering special permit application for landfill expansion." Section 3 was entitled "All communications concerning the proposed landfill expansion must be part of the public hearing record, and opponents must be afforded a rebuttal opportunity; ex parte¹ communications should be avoided." Section 6 was entitled "Citizens on all sides of an issue have a constitutional right to an impartial decision."

I have not altered my advice as set forth in that memorandum. In light of the proposals attached hereto as Appendices 1 & 2, I believe these sections of my March 6, 2008 memorandum are worth setting forth verbatim below.

The bottom line is that the public hearing process should afford all interested people a full, fair and open opportunity to present facts and opinions to the council to support or oppose landfill expansion. Due process and fundamental fairness require that councilors base their decision on information received through the public hearing process, where opponents have an equally full, fair and open opportunity to respond. Holding public forums or meetings outside

¹ In this case the term "ex parte communications" refers to any communication with a city council member concerning land fill expansion held outside of a public meeting or public hearing, or which is not a matter of public record. Black's Law Dictionary (8th ed. 2004) defines the Latin term "ex parte" as meaning "On or from one party only, usu. without notice to or argument from the adverse party <the judge conducted the hearing ex parte>." The Miriam Webster Unabridged Dictionary (on line edition 2002) defines the term in these words:

on or from one side only -- used of such legal matters as injunctions, commissions, hearings, and testimony and ordinarily implying a hearing or examination in the presence of or on papers filed by one party and in the absence of and often without notice to the other party

the public hearing process comes across to me as needless duplication, since all input must be included as part of the public hearing process if it is to be considered by councilors.

From a legal perspective, the more information that comes to councilors outside of the public hearing process, the more vulnerable to legal attack will be the council decision on a zoning special permit for landfill expansion. If the goal is to render whatever decision the council makes as immune as possible from annulment or remand by a court, then I respectfully submit that the prior advice, reiterated below, should be followed.

If there is a strong public demand for input outside the public hearing process, then why not address concerns to the Board of Public Works, which in this case is in the role of the real estate developer? As the potential applicant, the Board is the entity which should hear and respond to public concerns, so that those concerns may be taken into consideration before any special permit application is filed. The Board could have experts available to address the various parts of the expansion proposal. Such meetings should be posted as public meetings of the Board of Public Works, and the full record of such meetings should be provided to the City Council Clerk for inclusion in the special permit public hearing record.

* * * * *

These are the pertinent parts of the memo which was presented to the Northampton City Council at its meeting on March 6th, 2008:

1. City Council acts in a "quasi-judicial" rather than a legislative capacity when considering special permit application for landfill expansion.

Normally the City Council is a legislative and policy making body, but when acting as a zoning special permit granting/site plan review authority under the Northampton Zoning Ordinance, it functions in a very different "quasi-judicial capacity."²

The term "quasi judicial" is "The characterization of an adjudicatory function of an administrative agency...." Ballentine's Law Dictionary, at page 1038 (3rd. 1969). Black's Law Dictionary, at page 1245 (7th ed. 1999) defines the term this way:

Quasi judicial. A term applied to the action, discretion, etc., of public administrative officers or bodies, who are required to investigate facts, or ascertain the existence of facts, hold hearings, weigh evidence, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature.

² That a zoning special permit granting authority acts in a quasi-judicial capacity is settled law in Massachusetts. *Mullin v. Planning Board of Brewster*, 17 Mass. App. Ct. 139, 141-143, 456 N.E.2d 780, 782-783 (1983); *Sesnovich v. Board of Appeal of Boston*, 313 Mass. 393, 396, 47 N.E.2d 943, 945 (1943) ("The authority conferred upon the board by the governing statute has been described as 'quasi-judicial in its nature.'"), quoting *Coleman v. Board of Appeal of Building Department of Boston*, 281 Mass. 112, 115, 183 N.E. 166, 167 (1932)

* * * * *

3. All communications concerning the proposed landfill expansion must be part of the public hearing record, and opponents must be afforded a rebuttal opportunity; ex parte³ communications should be avoided.

When the Council acts in a legislative capacity (e.g. consideration of a proposed ordinance), off the record lobbying of individual legislators is a legitimate time-honored American tradition.

The situation is very different when the Council acts in a quasi-judicial capacity. Council members should not discuss the subject of a zoning special permit application (e.g. landfill expansion) outside of a public meeting or public hearing, just as a judge cannot discuss a case outside the courtroom with a lawyer, party, or witness.

Like a judge or jury who must decide a case solely on the basis of evidence presented in the courtroom, the City Council sitting as a zoning special permit granting authority must base its decision solely on the following:

- (a) information and documents presented during the public hearing,
- (b) documents filed by the applicant or by opponents for consideration by the Council; and
- (c) deliberations during a public meeting following the conclusion of the public hearing.

If ex parte communications do occur before the public hearing is closed, they must be reported in full either verbally at a public hearing session or in writing filed with the application and opposing papers available for consideration by all Council members. Only then can the communication be considered by the Council.

Ex parte communications following the close of the public hearing should be disclosed in writing filed with the application and opposing papers, but any information received cannot be considered in reaching a decision.

In all cases, the source of ex parte communications (e.g. name and address of individuals) must be disclosed.

My advice to Council members is that any attempt at ex parte communication should be avoided. Any person attempting to engage in such communication with a City Council

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member should be directed to speak to the entire Council at a public hearing or submit his/her concerns in writing to the entire Council.

On this issue, the following words from a Massachusetts zoning commentary (called a "treatise" in legal parlance) should be taken to heart by every council member:

Although Massachusetts courts have not squarely addressed the issue, decisions from other jurisdictions hold that undisclosed ex parte contacts with members of a municipal board may provide a basis for annulling a zoning decision:

[I]f an ex parte communication does take place, it must be placed on the public record to enable interested persons to rebut the substance of the communication. . . . [A]n ex parte contact between a zoning board and an interested party which is neither revealed to other interested parties nor made a part of the public record is a ground for reversing a decision of a zoning board.

Peterson v. City Council of Lake Oswego, 32 Or. App. 181, 190--91, 574 P.2d 326, 331--32 (1978); see also *Caruso v. Pastan*, 1 Mass. App. Ct. 28, 31 (1973) (private meeting between SPGA and another town board did not invalidate decision where "there is nothing to suggest that the merits of the pending case were discussed or that the basic decision of the board of appeals to grant the permit was influenced in any respect").

As a function of its quasi-judicial authority to adjudicate property rights, a zoning board is constitutionally required to afford an applicant for a variance or special permit and other interested parties a measure of procedural due process prior to formulating an adverse decision. Cf. *Vitale v. Planning Bd. of Newburyport*, 10 Mass. App. Ct. 483, 487 (1980) ("Due process does not require that an agency must bind itself to an error in perpetuity. . . . But an agency cannot revoke an approval without notice to, and an opportunity to be heard by, the parties affected."); *Fairbairn v. Planning Bd. of Barnstable*, 5 Mass. App. Ct. 171, 182 (1977) (developer who seeks subdivision approval is entitled to hearing regarding board of health recommendations). See also § 10.4.2, Conflict of Interest, above. The applicant and other interested persons are entitled to know the facts and other material in the board's possession on which it intends to rely in formulating its decision. Accordingly, communications with the board should be confined to

- documents on file with the board as public records prior to the public hearing,
- information presented to the board at the public hearing, and
- documents filed with the board as public records subsequent to the public hearing pursuant to a request for additional information made by the board at the public hearing.

The most common way in which this problem arises is the submission of additional material after the close of the hearing, without a request having been made for the information at the hearing and without affording opposing parties an opportunity for rebuttal. This misstep generally will require that the decision be remanded for reconsideration by the board if an appeal is filed within the twenty-day appeal period. *Lovaco, Inc. v. Zoning Bd. of Appeals of Attleboro*, 23 Mass. App. Ct. 239 (1986). But see *Fandel v. Board of Zoning Adjustment of Boston*, 280 Mass. 195 (1932) (fact that board read and considered several communications received after public hearing was not enough to show substantial injustice, and was not sufficient grounds to invalidate proceedings under former version of Boston Zoning Enabling Act).

SOURCE: Martin R. Healy (ed.), 1 Massachusetts Zoning Manual, §10.12.5 "Ex parte communications" (3rd ed. 1999 & Supps. 2002 & 2005)

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6. Citizens on all sides of an issue have a constitutional right to an impartial decision.

Article 29 of the Massachusetts Constitution's Declaration of Rights (hereafter "Article 29"), states in relevant part as follows:

It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit....

This constitutional requirement has been given broad application, extending beyond the court room to include administrative decision makers:

It applies to civil as well as criminal causes; and not only to judges of courts of common law and equity and probate, but to special tribunals, and to persons authorized on a special occasion to decide between parties in respect to their rights. It existed under the common law from the earliest times....

The principle applies to county commissioners, though they are not judicial officers...[Citation omitted.]...The principle applies to a juror. [Citation omitted.] Also to an appraiser of land set off on execution... [Citations omitted.] It applies to a referee, though referees are selected by the parties, unless the objection is known and waived. [Citations omitted.]

These decisions show that the provision is to have no technical or strict construction, but is to be broadly applied to all classes of cases where one is appointed to decide the rights of his fellow-citizens....

Hall v. Thayer, 105 Mass. 219, 221-223 (1870).

The protection of Article 29 has been applied to a modern quasi-judicial administrative proceeding where the decision was invalidated. *Police Commissioner of Boston v. Municipal Court of West Roxbury District*, 368 Mass. 501, 507, 332 N.E.2d 901, 905 (1975) (Article 29 applies to civil service commission hearing officer.). A Massachusetts Superior Court decision specifically applied Article 29 to a decision by a Zoning Board of Appeals. *Pierce v. Mulhern*, Civil Action No. 2001-2825-C (Middlesex Superior Court, January 27, 2003) ("Findings of Fact, Rulings of Law, and Order on Plaintiffs' Complaint for Declaratory Judgment") (Lauriat, J.).

A key aspect of Judge Lauriat's decision in *Pierce v. Mulhern* (at pages 10-13) is that violation of Article 29 can invalidate a zoning permit decision, even though there is no violation of the state conflict of interest law G.L. c. 268A. In other words, Article 29 and G.L. c. 268A each provide independent legal grounds for invalidating a judicial or quasi-judicial proceeding: "G.L. c. 268A focuses on potential financial and relationship conflicts, while Art. 29 addresses bias or prejudice on a broader basis.. The present action was brought under Art. 29 and not under G.L. c. 268A." *Pierce v. Mulhern*, *supra*, at page 20 n. 6. The standard adopted in *Pierce v. Mulhern*, *supra* (at page 2) is whether the administrative decision-maker's "impartiality was reasonably open to doubt."

Conclusion

Please let me know if there are questions or if anything more is needed in this regard. I would prefer that all communications with City Council members or other city officials on the landfill issue go through you as City Solicitor.

Very truly yours,

Michael Pill

MP/csh/L1.916.Northampton

APPENDIX NO. 1

April 3, 2008

Upon the recommendation Councilor M. LaBarge & Councilor Bardsl y

**RESOLUTION REGARDING CITY COUNCIL RESPONSIBILITY FOR HOLDING PUBLIC MEETINGS ON
PROPOSED LANDFILL EXPANSION**

- WHEREAS, the Northampton City Council will act as the granting authority when and if the Northampton Department of Public Works applies for a special permit to expand the Northampton Regional Landfill; and
- WHEREAS, the Northampton City Council has been advised by City Solicitor Janet Sheppard and Special Counsel Michael Pill not to engage in any conversations regarding the proposed landfill expansion unless those conversations are within the context of a duly posted public meeting; and
- WHEREAS, citizens of Northampton have requested that the Northampton City Council hold public forums on the proposed expansion; and
- WHEREAS, there already exists a significant body of information about the Northampton Regional Landfill expansion proposal, including Environmental Impact Reports, the Site Suitability Report, the National Heritage and Endangered Species Program Report, and air and water monitoring data that has been submitted to the Massachusetts Department of Environmental Protection; and
- WHEREAS, the Northampton DPW is likely to apply for the special permit immediately after the results of the current on-going health studies are reported;

NOW, THEREFORE BE IT RESOLVED,

The Northampton City Council will sponsor and organize at least four public forums regarding the financial, environmental, public health and sustainability impacts of the proposed landfill expansion on the current and future residents of Northampton and surrounding communities.

These forums will be organized in such a manner to both present information to the general public in a timely fashion as well as to allow reasonable periods of time for public comment and discussion.

These forums will commence in late April and will continue until after the health reports have been issued. One of the forums will include Dr. Robert Newton, member of the Barnes Aquifer Protection Advisory Committee.

These forums will be posted as special meetings of the Northampton City Council, will be held in a facility that can comfortably accommodate a large crowd, will be well publicized with reasonable advance notice, and will be taped to ensure that they become part of the official record.

Officials and residents of the City of Easthampton will be invited to these forums.

APPENDIX NO. 2

Proposed amendment to the "Resolution Regarding City Council Responsibility for Holding Public Meetings on the Proposed Landfill Expansion" introduced on April 3, 2008 and sponsored by Councilors M. LaBarge and Bardsley: